

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: August 16, 2001

BALCA Case No. 2000-INA-105
[ETA No. P1997-NY-02108890]

In the Matter of:

HANNA KARWOWSKA,
Employer,

on behalf of

MARIAN DABROWSKI,
Alien

Certifying Officer: Dolores DeHaan, New York, NY

Appearances: Tadeusz Kucharski
Brooklyn, NY
For Employer

Before: Burke, Vittone and Chapman
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of Domestic Cook. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20. We base our decision on the record upon which the CO denied certification and Employer's request for review and any written arguments. 20 C.F.R. 656.27(c).

STATEMENT OF THE CASE

On November 6, 1996, Employer, Hanna Karwowska, filed an Application for Alien Employment Certification seeking to fill the position of "Domestic Cook (Live-out)." (AF 3-6). The duties were listed as follows:

Prepare and cook Polish meals including: Pierogis, Stuffed Cabbage, Tripe, Kolduny, Pyzy, Bigos, Beef Tartar Style, Borscht, Cold Beet Soup, Kasha, Purchase foodstuff, Clean kitchen.

(AF 6). Employer required two years of experience in the job offered. *Id.*

On June 9, 1999, the CO issued a Notice of Findings (“NOF”), noting that “the requirement that applicants have experience in a particular type of ethnic/religious food is employer’s personal preference and not a normal job requirement.” (AF 27). The CO, therefore, advised Employer to either delete the restrictive requirement calling for the applicant to have two years of specialized experience in the preparation of Polish food or submit evidence to show that a business necessity warranted the requirement pursuant to § 656.21(b)(2). *Id.* The CO also questioned whether the position presented a bona fide job opportunity under § 656.20(c)(8). (AF 28-29).

On July 2, 1999, Employer filed her Rebuttal to the NOF. (AF 37-52). The Rebuttal primarily supplied answers to the twelve questions presented in the NOF regarding the existence of a bona fide job opportunity. (AF 50-52). Employer, however, did remark that her business interests necessitated the hiring of a Polish cook. She also alleged that 90% of her customers are of Polish descent, and thus, expect to be served high-quality, Polish food when invited to her home. (AF 51). Employer further asserted that her reputation as an owner of beauty salons would suffer if her clients were not served Polish food. (AF 50-51). Then, in response to one of the CO’s requests in the NOF, Employer submitted a copy of her entertainment schedule from November 1995 through October 1996, detailing the number and type of meals served as well as the number of guests present. (AF 37-49). Employer appears to have entertained guests about three times per week. *Id.*

On August 19, 1999, the CO issued her Final Determination (“FD”), denying the application on the ground that Employer failed to submit requested evidence to support the business necessity of the ethnic cooking requirement¹. (AF 54-55).

On December 7, 1999, Employer filed a Request for Administrative Judicial Review of Denial of Labor Certification. (AF 70-71). After the case was docketed, Employer informed the Board that she would not submit an additional statement or brief because the grounds for her appeal had already been raised in her Request for Review.

DISCUSSION

In *Martin Kaplan*, 2000-INA-23 (July 2, 2001) (*en banc*), the Board held that "cooking

¹Employer successfully rebutted the finding that the position did not present a bona fide job opportunity. (AF 59).

specialization requirements for experience in specific styles or types of cuisine are unduly restrictive within the meaning of the regulation at section 656.21(b)(2), and therefore must be justified by business necessity." *Kaplan*, 2000-INA-23, slip op. at 3. To establish business necessity under section 656.21(b)(2)(i), an employer must demonstrate that the job requirements bear a reasonable relationship to the occupation in the context of the employer's business and are essential to perform, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (*en banc*). In the context of domestic cook specialization requirements, the first prong of the business necessity test may often focus on how the cooking specialization is related to the family's need for a cook. The second prong of the test may often focus on whether the length of experience stated by the employer as a job requirement is required to be able to cook the specialized cuisine. *Kaplan*, *supra*, slip op. at 10.

In the NOF, the CO informed Employer that she may rebut her finding that the requirement for a cook with two years' experience preparing Polish cuisine was unduly restrictive by providing evidence that:

- 1) An applicant with two years of cooking experience could not readily adapt to a Polish style of cooking;
- 2) An applicant with no prior experience in Polish cooking is incapable of preparing Polish food; and
- 3) Neither Employer nor anyone else in her family is able to provide training or instruction in the Polish cooking tradition.

(AF 27).

Employer, however, failed to provide any such evidence to establish that the job requirements are essential to the performance of the job duties. In her Rebuttal, Employer maintained that when her niece temporarily returned to Poland two years prior, Employer hired a cook without experience in Polish cooking and subsequently attempted to train him/her. (AF 50-51). Employer alleged that the results were disastrous and resulted in lost business deals. *Id.* This assertion, nonetheless, remains unpersuasive without accompanying reasoning or evidence since it does not prove that an otherwise experienced domestic cook is unable to learn Polish cooking within a reasonable period of taking the job. Any number of variables, such as the innate talent of the hired cook, the length of the training period, or Employer's training methods, could easily have contributed to the Employer's dissatisfaction with the cook, and thus, Employer's experience does not rule out the possibility that another cook who is also inexperienced in Polish cooking might be quite successful in learning how to prepare such cuisine in a short period of time.

Employer also asserted in her Rebuttal that it is impossible for any of the six adults living in the household to train a cook. However, incapacity to provide training does not furnish

evidence relating to the length of time it takes to gain competency in Polish cooking. Nor does it suggest that someone without experience cooking Polish foods cannot learn how to prepare the cuisine via another method, such as through the consultation of cookbooks. Thus, in light of the foregoing, the two year specialization requirement remains unduly restrictive since Employer has not sufficiently linked the requirement to successful execution of the job.

ORDER

Since we find that Employer has not documented that two years of experience in the cooking specialization is supported by a business necessity, we **AFFIRM** the CO's Final Determination denying alien labor certification.

SO ORDERED.

Entered at the direction of the Board by:

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of

the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.